IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
June 25, 2009 Session

GERD MARKOW v. GARY POLLOCK, d/b/a POLLOCK PRINTING, INC.

Appeal from the Chancery Court for Davidson County
No. 05-2390-IV Richard Dinkins, Chancellor

No. M2008-01720-COA-R3-CV - Filed December 22, 2009

The plaintiff initiated an action for breach of contract against the defendant printing company, seeking to recover payments pursuant to the terms of the contract, along with additional expenses. In a counterclaim, the defendant sought to recover amounts it paid to complete the project. The trial court initially awarded the plaintiff a judgment totaling $65,773.24. Upon the defendant's motion to alter or amend judgment, the trial court reduced the original judgment award to $21,078.89. The plaintiff appealed. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed; Case Remanded

JOHN W. MCCLARTY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J. and D. MICHAEL SWINEY, J., joined.

Joseph M. Dalton, Jr., Nashville, Tennessee, for Appellant, Gerd Markow.

James R. Tomkins, Nashville, Tennessee, for Appellee, Pollock Printing, Inc.

OPINION

I. BACKGROUND

Pollock Printing, Inc. ("Pollock") is a family owned printing business in Nashville, Tennessee. The company concentrates on printing material for various religious publishers. Ronnie Pollock serves as the President of the business, and his son, Gary Pollock, is the Vice President.

In 2001, Gary Pollock requested that Gerd Markow d/b/a GM Service ("Markow") locate a 6-Unit press with updated features. Markow considered ten to fifteen presses in different printing plants before selecting a press located in Florida. Pollock subsequently contracted with Markow to

purchase the used Hantscho MK IV 6-Unit, 2 Web, Heatset Printing Press. The parties agreed to disassemble the press in Florida and transport it to Tennessee. Markow contracted Continental Machinery Movers ("Continental") to transport and deliver the disassembled press at a cost of $22,500.

The parties also agreed to a turnkey installation of the press ("the Contract"). The Contract's specifications included that the press would run on a production rate of 35,000 items per hour of every day. The Contract's price totaled $1,520,000, with Pollock selling to Markow its old web press for the sum of $100,000. As a result, the Contract's net price was $1,420,000. Markow opined that a comparable new press would cost as much as six million dollars.

The Contract called for certain upgrades to the press that included: (1) purchase and installation of an emission control afterburner on the roof; (2) a new chill system; and (3) a model number M40BAT Oxy-Dry sheeter with WPC Microtrak registration controls.

Unfortunately, Continental employees encountered difficulties as they began to bring the machines into the Pollock facility. Because of the delays, Markow's contract with Continental expired prior to completion of the job. Components of the press were left on the dock and in the parking lot of the Pollock facility. Markow testified that he began the installation even though components of the press remained outside the Pollock facility. He then contracted Industrial Tool and Machine to bring in the remaining components and reconfigure the press. Markow later invoiced Pollock for $24,000, representing the cost of Industrial Tool and Machine's services.

Markow hired Udo Breisinger to assist in moving and installing the press. He asserts that he did not need Mr. Breisinger's assistance, but he hired Mr. Breisinger at the request of Pollock. Markow eventually invoiced Pollock $55,000 for Mr. Breisinger's services.

Markow claims that problems with installing the press stemmed from Pollock's decision to reconfigure the press in a different manner than its prior set up in Florida. Adapting the Pollock facility to accommodate the press caused obstacles with the installation. As a result, Pollock repaired the facility's electrical components, pipelines for plumbing, the pneumatic air supply, and gas lines. Despite the delays and problems, Markow claims the press was operational by July 27, 2001. At this time, Markow invoiced Pollock for the final payment of $100,000.

According to Markow, Pollock then asked him to stay on and "troubleshoot" the press. He remained for an additional 33 days in this capacity until he was instructed to leave. He invoiced Pollock his "customary rate" of $100 per hour for the 33 days of troubleshooting, totaling $33,000.

In Pollock's view, despite installing the press in a busy printing plant, it gave Markow full access to the site and accommodated him and his workmen. Pollock claims that it also supplied extra labor for Markow's use at no charge.

Pollock claims the work progressed reasonably well at first; however, as time went on, Markow showed less attention to the job. He increasingly failed to fulfill his responsibilities as to preparing the press for printing according to the Contract's specifications. Additionally, Pollock alleges that Markow became romantically involved with one of its female employees. Thereafter, Markow spent time with her and worked on the old press that he purchased from Pollock.

Pollock officials discussed the problems with Markow and encouraged him to complete the project. Ultimately, Pollock conducted a meeting with Markow on September 14, 2001. At that time, the parties set a deadline, September 28, 2001, for Markow to complete the installation and prepare the press to operate in accordance with the Contract's specifications. Markow failed to meet the deadline. On October 3, 2001, Pollock terminated Markow's services.

Under the Contract, Pollock paid $1,320,000 to Markow. During the course of the project, Pollock paid an additional $188,930 because of five change orders to the Contract. The change orders included extra parts and materials that were needed to complete the installation.

According to Pollock, it hired various companies to work or provide parts to complete the installation and to attempt to bring the press up to the specifications set out in the Contract. Pollock expended $140,072.99 in reasonable and necessary expenses to complete the installation. Giving a credit for the final $100,000 payment that Pollock did not tender to Markow, Pollock spent $40,072.99 to substantially complete Markow's unfinished work.

On September 21, 2005, Markow sued Gary Pollock,[1] individually, and the Pollock printing company, claiming breach of contract, misrepresentation, and unjust enrichment. In the Complaint, Markow alleged that he was entitled to the final $100,000 payment under the Contract. He also claimed that he was entitled to $24,000 for Industrial Tool and Machine's services; $33,000 for the additional days he worked at the Pollock facility; $55,000 for Mr. Breisinger's services; $61,000 for the installation of a new "color control ink key system"; and $90,000 for installation of an upgraded "Oxy Dry Sheeter" on the press.

Pollock denied that it owed Markow any additional payment and filed a countersuit alleging that Markow breached the Contract by failing to complete the installation of the web press in a timely manner and in accordance with the Contract's specifications. Pollock's counterclaim sought a judgment against Markow for breach of contract, unjust enrichment, pre-judgment interest, and attorney's fees.

After a bench trial, the trial court ruled as follows:

> (1) Plaintiff incurred the additional (and unforeseen) expense in hiring another company, Industrial Machine, to complete the task. The Court finds that this is an expense of the Plaintiff and not to Defendant;

[1] Gary Pollock was dismissed as an individual defendant by agreed order.

(2) Mr. Breisinger's services were procured at the request of Defendant, outside of the proposal submitted by Plaintiff, and is properly chargeable to Defendant;

(3) At some point during the installation process, the decision was made to go with a later model sheeter, which was purchased by Plaintiff for $120,000, with credit given for the $30,000 allocated in the proposal for the existing sheeter. . . . [T]he new sheeter was installed and is a part of the press machine now. Plaintiff is entitled to the balance owed for the replacement sheeter;

(4) Plaintiff is not entitled to the [$33,000] payment, as the testimony at trial was that troubleshooting is a necessary component of a turnkey project once the press was installed;

(5) Plaintiff is not entitled to the final payment of $100,000 as it was the responsibility of the Plaintiff to transport and fully install the press and to have it in operation in accordance with Defendant's reliance upon and engagement of him.

(6) [T]he $140,073 claimed by Defendant should be reduced by $60,773.24, leaving $79,299.76 due Defendant from Plaintiff, which is an offset against the amounts due Plaintiff.

Therefore, the trial court awarded a judgment of $65,773.24 in favor of Markow.[2]

Pollock subsequently filed a motion to alter or amend the judgment, asserting that the trial court erred in calculating the judgment award to Markow. In its motion, Pollock contended that (1) Markow was not owed any additional payment for the upgraded sheeter because Markow waived that claim at trial; (2) Markow was not entitled to extra payment for Mr. Breisinger's services because his work was included in the original Contract; and (3) the trial court should grant Pollock an award for $47,652.34 representing the cost to complete the installation of the press through the services of M.R.S. Printing Erectors.

After a hearing on the motion, the trial court amended its original judgment. The trial court reduced the award for the upgraded sheeter to $65,000; reduced the award for Mr. Breisinger's charges to $35,305.65; and denied Pollock's request for reimbursement of M.R.S. Printing Erectors' charges. As a result, the trial court reduced the original judgment of $65,773.24 by $44,694.35, leaving a total judgment of $21,078.89 in favor of Markow. Markow filed a timely notice of appeal.

II. ISSUE PRESENTED

Whether the trial court erred in awarding Markow a judgment totaling $21,078.89.

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[2] The trial court miscalculated the judgment total; the original judgment should be $65,700.24.

III. STANDARD OF REVIEW

On appeal, the findings of fact of a trial court sitting without a jury are reviewed de novo with a presumption of correctness. Tenn. R. App. P. 13(d). The court will not disturb the trial court's findings of fact "unless the preponderance of the evidence is otherwise." *Id.* However, the trial court's conclusions of law are reviewed de novo with no presumption of correctness. *Ganzevoort v. Russell*, 949 S.W.2d 293, 296 (Tenn. 1997).

IV. DISCUSSION

Markow asserts that he is entitled to a judgment of $212,000.00 for the completion of the project and payment for other services, labor, and equipment. The amount represents a total of separate claims. We address each claim in turn.

A. $100,000 Final Payment

Markow contends that Pollock materially breached the Contract by failing to make the final payment of $100,000. In Tennessee, a breach of contract claim includes the following elements:

> (1) the existence of an enforceable contract;
>
> (2) nonperformance amounting to a breach of the contract, and
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> (3) damages caused by the breach.

ARC LifeMed, Inc. v. AMC-Tennessee, Inc., 183 S.W.3d 1, 26 (Tenn. Ct. App. 2005) (citations omitted). Markow also alleged a claim of unjust enrichment; he claims that he incurred additional expenses, on behalf of Pollock, to complete the job. To resolve unjust enrichment claims, courts may impose a contractual relationship between the parties, regardless of their assent. *See Bennett v. VISA USA, Inc.*, 198 S.W.3d 747, 755 (Tenn. Ct. App. 2006). The elements of an unjust enrichment claim are:

> (1) a benefit conferred upon the defendant by the plaintiff;
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> (2) appreciation by the defendant of such benefit; and
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> (3) acceptance of such benefit under circumstances that it would be inequitable for him to retain the benefit without payment of the value thereof.

Id. Establishing that the plaintiff conferred an unjust benefit to the defendant is the most significant requirement of an unjust enrichment claim. *Id.* Markow supports his claims for breach of contract

and unjust enrichment by claiming that under all circumstances, he performed the work within a reasonable time. With respect to a contract, time may be of the essence if made so by "express stipulation, a manifestation of intention from the contract or subject matter involved, or an implication from the nature of the contract or circumstances of the case." *Commerce St. Co. v. Goodyear Tire & Rubber Co.,* 215 S.W.2d 4, 11 (Tenn. Ct. App. 1948). Markow points out that the Contract did not contain a "time is of the essence" clause, and he was only obligated to complete the installation of the press within a reasonable time. As stated in *Minor v. Minor*, 863 S.W.2d 51, 54 (Tenn. Ct. App. 1993),

> [w]here no provision is made in the contract for performance, a reasonable time is implied. Completion of a contract within a reasonable time is sufficient if no time is stipulated. Where the parties have not clearly expressed the duration of the contract, or where the duration of the contract is indefinite, the courts will imply that they intended performance to continue for a reasonable time. What constitutes a reasonable time within which an act is to be performed where a contract is silent upon the subject depends on the subject matter of the contract, the situation of the parties, their intention in what they contemplated at the time the contract was made, and the circumstances attending the performance.

Id. at 54 (citations omitted).

To counter, Pollock asserts that Markow is not entitled to the final payment of $100,000 because Markow materially breached the contract. "[T]here can be no recovery for damages on the theory of breach of contract by the party who himself breached the contract." *United Brake Sys., Inc. v. Am. Envtl. Prot., Inc.*, 963 S.W.2d 749, 756 (Tenn. Ct. App. 1997). When one party to a contract materially breaches the same, is unable to perform, or manifests an intention to no longer be bound by the contract, the non-breaching party is excused from further performance. *See Lopez v. Taylor*, 195 S.W.3d 627, 635 (Tenn. Ct. App. 2005). Moreover, "[a] party who has materially breached a contract is not entitled to damages stemming from the other party's later material breach of the same contract." *United Brake Sys.*, 963 S.W.2d at 756.

In cases where both parties have not fully performed their contractual obligations, it is necessary for the courts to determine which party is chargeable with the first uncured material breach. *McClain v. Kimbrough Const. Co.*, 806 S.W.2d 194, 199 (Tenn. Ct. App. 1990). The determination of whether a breach is material requires consideration of the following factors:

> (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected;
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> (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;
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> (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;

(d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;

(e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

Id. (quoting Restatement (Second) of Contracts § 241 (1979)).

The contract at issue is a "turnkey" contract. The parties do not dispute that the Contract required Markow to provide a complete installation of the press in accordance with the Pollock's specifications; the Contract called for the press to consistently produce 35,000 items per every hour of every day.

The trial testimony reveals that the parties encountered unforeseen difficulties with the installation of the press. Due to the age of the machine, the installation's difficulties stemmed from adapting the press to Pollock's facility and configuring the press to Pollock's intended use. Steve Cross, former web press supervisor at Pollock and Mike Robirds, press room foreman, testified to the obstacles of installing the press at Pollock's facility. The problems necessitated Pollock to enlarge the facility's gas lines, purchase new air compressors, reconfigure the finish line, and install a new ink control system. Pollock repaired these problems to enable Markow's installation of the press. Additionally, Pollock continued to help Markow complete its obligations under the Contract by providing labor from its own staff at no cost and conducting meetings with Markow about finishing the installation of the press.

Markow testified that he installed the press according to the Contract's specifications, and the press performed in a commercial setting. Despite Markow's claims, a review of the record indicates otherwise. In a letter dated September 6, 2001, Pollock informed Markow that it would provide Markow with a four-person crew and should the press not run to its satisfaction by September 14, 2001, Pollock would discontinue Markow's services. The president of Pollock Printing, Ronnie Pollock, testified that in a meeting on September 14, 2001, Pollock extended the deadline to September 28, 2001, and expressed its need for Markow to quickly finish the repairs and make the press operational. During direct examination, Mr. Pollock explained that he gave a $20,000 check to Markow as an inducement to "get this job completed and up and running." Mr. Pollock stated, "This was a gesture on my part to ask him to please continue to finish that job and get it done for us." The evidence at trial illustrates that after the initial installation of the press in July 2001, the press failed to perform properly and according to the Contract's specifications. The record contains lists identifying various parts and components needing repair to make the press operational to the Contract's specifications. From July 2001 through September 2001, Pollock employees prepared and submitted these lists to Markow.

After Markow's installation of the press, it only produced two jobs. The first job was a simple, one color, coldset, print job with approximately 25,000 pieces; the second job was a four-color, coldset, print job running on four of the six units of the press with approximately 400,000 to

800,000 pieces. A "coldset" job consists of a less sophisticated process where the printing ink dries without engaging the dryers on the press. Mr. Robirds testified that the press did not operate properly with either job. Explaining that several components on the press failed to work, Mr. Robirds testified that the press never operated properly during Markow's tenure at the Pollock facility. Mr. Robirds further noted that at the time of trial, the press was unable to produce consistently 35,000 items per hour. Because of the delay in making the press operational according to the Contract's specifications and dissatisfaction with Markow's work, Pollock terminated Markow in early October 2001.

In light of the above proof, the trial court appropriately concluded that Markow breached the Contract. Under the Contract, Markow's obligations included transporting and installing the press according to Pollock's intended uses for the press. The evidence presented at trial highlights Pollock's efforts to encourage Markow to complete the job and Markow's failure to install the press according to the Contract's specifications. As a result, we agree with the trial court that Markow is not entitled to the final turnkey payment of $100,000. Markow's failure to completely execute his contractual obligations constituted a material breach of the Contract. His material breach excused Pollock's obligation to tender the final payment. At the time of trial, the press failed to conform to the Contract's specifications as it was unable to consistently produce 35,000 items per hour of every day. Therefore, we affirm and hold that Markow should not receive a judgment including the $100,000 final payment.

B. $24,000

Markow initially contracted Continental Machinery Movers to unload the press and move it into the Pollock facility. Markow claims that Continental could not accomplish that task within the contracted period because Pollock interfered and caused delays. Due to Pollock's interference, Markow asserts that he incurred an additional $24,000 in costs by hiring Industrial Tool and Machine to complete the move.

The evidence at trial contradicts Markow's assertion that Pollock interfered with Continental's unloading of the press. Steve Clinard of Continental appeared at trial and he testified that the press was larger than anticipated, requiring close maneuvering though the Pollock facility. Mr. Clinard testified that Pollock provided a main pathway for moving the equipment into the facility and Pollock's employees provided cooperation causing no delays in moving the equipment. Additionally, it was in Pollock's financial interest for Markow to transport and install the press as quickly as possible because of its own contractual obligations. Ronnie Pollock and Gary Pollock testified that the press was needed for an upcoming print job for Bed, Bath, and Beyond.

The trial court did not award an additional $24,000 to Markow, finding that "Plaintiff underestimated the time and effort required and the additional expense was not caused by any action or inaction attributable to Defendant." Our review of the record demonstrates that the evidence preponderates in favor of the trial court's conclusion. Under the terms of the Contract, Markow was

responsible for the transport of the press from Florida to Nashville, Tennessee. Because it does not appear that Pollock did anything to delay the transport of the press into its facility, we find no merit in Markow's claim for $24,000. Consequently, Markow is not entitled to any extra payment for expenses related to Industrial Tool and Machine's services.

C. BREISINGER

Markow claims, at the request of Pollock, he hired Udo Breisinger to help work on the press. According to Markow, he proposed that Mr. Breisinger only work on the press as a "contingency plan" in the event he could not carry out his obligations under the Contract. In a letter dated January 26, 2001, Markow assured Pollock that Mr. Breisinger would be available to complete the job if Markow became "physically [unable to] fulfill the contract for a turnkey installation."

Pollock contends that it never agreed to pay for Mr. Breisinger's services. Rather, Pollock officials expressed concern about the job's completion if Markow could not complete the job, and Markow provided assurances in the letter dated January 26, 2001. Pollock claims that Markow's letter did not confirm any agreement allowing Mr. Breisinger to work on the installation of the press at extra cost to Pollock. Pollock points out that Markow's trial testimony does not support such a claim. Markow testified that he discussed bringing Mr. Breisinger onto the job as a contingency plan with Ronnie Pollock. Further, Markow admitted that he did not know the date that Pollock agreed to pay for Mr. Breisinger's services nor the amount Pollock agreed to pay for Mr. Breisinger's services.

The parties signed the Contract in June 2001 – three months after Mr. Breisinger began working on the installation of the press. However, the parties failed to include provisions in the Contract regarding payment for Mr. Breisinger's services. Nonetheless, the Contract required that any change orders appear in writing with the signatures of both parties. Pollock argues that Markow never executed a change order for Mr. Breisinger's services. Additionally, Markow sent Pollock a letter dated April 17, 2001, to clarify the parties' relationship and to reiterate that contract modifications require written change orders signed by Markow and two Pollock representatives. The letter further stated:

> I would like to reiterate that, nothing will be ordered, or any additional work will be started, without a signed original contract along with applicable down payments.
>
> All work that has been done, so far, has been done in the normal course of business and will continue to be completed, on time. I urge you to provide proper documentation on all future Purchase Change Orders.

The Contract also contained a similar provision requiring written change orders for any contract modifications. The Contract provided:

> Any alteration or deviation from the above specifications involving extra costs, will be executed only upon written orders, and will become an extra charge over and above the estimate.

Kerry Krantz, the Controller of Pollock Printing, testified that Markow never presented any claim or invoice for Mr. Breisinger's charges before attaching an invoice to the Complaint. According to Markow, he paid Mr. Breisinger over $59,000, but charged Pollock only $55,000. Pollock asserts that Markow only sought additional payment for Mr. Breisinger's charges because his relationship with Pollock soured. Pollock argues that Markow unilaterally decided to hire Mr. Breisinger for the installation of the press as evidenced by the fact that Markow waited until July 2001 to send an invoice to Pollock for Mr. Breisinger's services. Thus, Pollock contends that it is not obligated to pay for Mr. Breisinger's services under the Contract, and Markow assumed responsibility for Mr. Breisinger's charges. Alternatively, if the court decides that Markow is entitled to payment for Mr. Breisinger's services, Pollock contends that the trial court correctly awarded Markow the balance of Mr. Breisinger's charges that were incurred after April 1, 2001.

Generally, Tennessee courts follow the rule that "allows contracts to be orally modified even if the contracts specifically state that the contract can only be modified in writing." *Moulds v. James F. Proctor, D.D.S., P.A.*, 1991 WL 137577, at *3 (Tenn. Ct. App. W.S., July 29, 1991); *see also Knoxville Rod and Bearing, Inc., v. Bettis Corp. of Knoxville, Inc.,* 672 S.W.2d 203, 207 (Tenn. Ct. App. 1983). "After a written contract is made, it may be modified by the express words of the parties in writing, as well as by parol." *Galbreath v. Harris,* 811 S.W.2d 88, 91 (Tenn. Ct. App. 1990) (citing *Co-Operative Stores Co. v. U.S. Fid. Guar. Co.,* 195 S.W. 177, 180 (1917)). However, both parties must consent to the modifications whether written or oral. *Id.* at 92 (citing *V.L. Nicholson Co. v. Transcon Inv. & Pin. Ltd., Inc.*, 595 S.W.2d 474, 482 (Tenn. 1980)). Because the modification of a contract constitutes a new contract, it requires consideration to support it. 17A C.J.S. *Contracts* § 411 (1999).

The trial court found that Markow procured Mr. Breisinger's services at the request of Pollock, outside of the proposal submitted by Markow, and that the cost was properly chargeable to Pollock. The trial court determined that Markow should not be awarded the amounts charged by Mr. Breisinger before April 1, 2001. As a result, the trial court awarded $35,305.65 to Markow for Mr. Breisinger's charges. The evidence does not preponderate against the trial court's conclusion. We disagree with Pollock's contention that Markow unilaterally decided to hire Mr. Breisinger. It appears that Markow agreed to hire Mr. Breisinger to accommodate Pollock's request. Therefore, mutual assent existed between the parties concerning Mr. Breisinger's services, and we find that the oral agreement between Markow and Pollock constitutes a valid contract modification. Although Markow did not immediately provide an invoice for Mr. Breisinger's services, Pollock permitted Mr. Breisinger to work on the installation of the press for months without objection. Further, the absence of a change order for Mr. Breisinger's charges is of no consequence. On cross-examination, Mr. Krantz admitted that Pollock issued many checks for Markow's additional expenses without change orders. Accordingly, we hold that the trial court properly awarded Markow the amount for Mr. Breisinger's charges beginning April 1, 2001.

D. $33,000

Markow contends that he completed his contractual obligations as of June 15, 2001, and he remained on the job for an additional 68 days to assist with "troubleshooting" the press. In the Complaint, Markow alleged that he waived the fees for the first 35 days, but he claims $1,000 per day for the remaining 33 days. According to Markow, after the press successfully ran a four-color job on July 27, 2001, Pollock requested that he remain at the facility. Markow claims $33,000 for the additional time and expertise that he provided to Pollock after he finished the installation of the press.

In response, Pollock argues that Markow remained at the facility because the press failed to operate according to the Contract's specifications. Pollock asserts that the trial court correctly concluded that Markow's work from July 27, 2001, through October 3, 2001 consisted of his original obligation to complete the turnkey installation, and the trial court denied his claim for extra payment.

We agree with the trial court's conclusion that Markow is not entitled to the additional payment of $33,000. The record demonstrates that problems surrounded the installation and operation of the press according to the Contract's specifications, and Markow remained at the facility to address those issues. Markow's own trial testimony indicates that he remained on the job to make the press operational. On cross examination, Markow explained that during the additional three months, he "reset a lot of equipment, machinery" and "modified a lot of parts, drive shafts for the new modification on the finishing line where they get this part done. . . ."

The other evidence in the record likewise supports the conclusion that Markow's work after July 27, 2001, constituted his initial responsibility to prepare the press for printing. The record includes trial exhibits of journal entries and lists created by Steve Cross. Mr. Cross documented the problems with the press and noted the remaining unfinished tasks concerning the press's operation. Testifying about the items on the list, Mr. Cross stated as follows:

> Some of it was just to get the press to go. Some of it was to get the press to print. Some of it was to get it to dry. And some of it was to be able to run and save good books without throwing – filling baskets with waste.

Mike Robirds corroborated the problems with the press in his testimony. He testified that the press was not "operating in a commercially useable fashion" in July 2001. Mr. Robirds further testified that many parts and components of the press needed repair and replacement including the ink rollers, water rollers, and the color control system.

We find nothing in the record to contradict the trial court's determination that Markow remained at the Pollock facility to complete his original contractual obligation to provide a turnkey installation of the press. In fact, the evidence in the record details the problems surrounding the

press's installation, which called for Markow's extended stay at the Pollock facility to resolve those problems. Therefore, we affirm the trial court's finding that Markow was not entitled to an additional $33,000 for the services he provided after July 27, 2001.

E. OXY DRY SHEETER

On appeal, Pollock questions whether the trial court erred in awarding Markow payment for the upgraded Oxy Dryer Sheeter ("sheeter"). Pollock argues that Markow lacks a valid claim for extra payment for the upgraded sheeter. In the alternative, if a valid claim exists, Pollock contends that Markow waived the claim at trial.

To support the above contention, Pollock points to Markow's trial testimony where he admitted that no written change order provided for an upgraded sheeter. Additionally, Markow failed to introduce an invoice for the sheeter as an exhibit at trial. During the cross examination of Markow, the trial court interrupted questioning and asked if Markow sought reimbursement for the upgraded sheeter. Markow's counsel replied, "No," and the trial court stated, "Okay." Pollock's counsel then discontinued questioning about the sheeter. As a result, Pollock claims that Markow waived the claim, and he is not entitled to the award of $65,000 for the upgraded sheeter.

In the Order dated March 11, 2008, the trial court initially awarded $90,000 to Markow for the upgraded sheeter. The trial court found that "during the installation process, the decision was made to go with a later model sheeter, which was purchased by Plaintiff." The trial court determined that Markow was entitled to the balance for the replacement sheeter because "the new sheeter was installed and is a part of the press machine now." Upon Pollock's motion to alter or amend the judgment, the trial court amended its initial award of $90,000. Addressing Pollock's assertion that Markow waived the claim at trial, the trial court stated:

> [T]here was an upgrade and it would be inequitable to allow the Defendant to have the benefit of the same without some compensation for it, and therefore, the amount heretofore awarded to the Plantiff for the oxy-dryer sheeter upgrade in the amount of Ninety Thousand Dollars ($90,000.00) should be reduced to Sixty-Five Thousand Dollars ($65,000.00) based upon Mr. Markow's testimony as to the amount he expended for the same[.]

We agree with the trial court's assessment of Markow's claim for the upgraded sheeter. Under the principles of unjust enrichment, it would be inequitable for Pollock to reap the benefit of the upgraded sheeter without paying for it. *See Bennett*, 198 S.W.3d at 755. As a result, we reject Pollock's contention that Markow did not have a valid claim for the value of the sheeter and Pollock's waiver argument. Markow's claim for the sheeter satisfied the elements of an unjust enrichment claim, and the evidence in the record does not preponderate against the trial court's determination. Accordingly, we affirm the trial court's determination to award Markow $65,000 for the upgraded sheeter.

F. $47,652.34

Pollock also raises on appeal whether the trial court erred in denying its counterclaim of $47,652.34 for M.R.S. Printing Erectors' charges. Pollock contends Markow owes $47,652.34 for the expenses it incurred to complete the installation of the press according to the Contract's specifications. Pollock hired M.R.S. Printing Erectors to repair and reinstall 12 to 14 cylinders on the press. John Michel, president of M.R.S. Printing Erectors, testified by deposition and stated that the work was necessary for the press to print a marketable product. Mr. Michel also testified that the cost of the repair was reasonable and customary within the industry.

The trial court found that Pollock engaged the services of M.R.S. Printing Erectors in February 2002, seven months after the first run on the press in July 2001. Because Pollock waited seven months to solicit the services of M.R.S. Printing Erectors, the trial court found that "Plaintiff should not be charge[d] with the amount incurred by Defendant for [the] reconditioning of the cylinders."

We agree with the trial court's conclusion that the expenses related to M.R.S. Printing Erectors is not properly chargeable to Markow. The reconditioning of the cylinders falls outside of Markow's original proposal, and it was not a component of the turnkey installation. The trial court correctly awarded Pollock $79,299.76 in damages as a set-off amount. The evidence in the record does not preponderate against the trial court's conclusion, and we affirm.

G. PRE-JUDGMENT INTEREST

It is within a trial court's sound discretion to award pre-judgment interest. *Franklin Capital Assocs., L.P. v. Almost Family, Inc.*, 194 S.W.3d 392, 405 (Tenn. Ct. App. 2005). The trial court's determination concerning pre-judgment interest will be overturned only if there is a "manifest and palpable abuse of discretion." *Id.* When the court's decision is reviewed under that standard, "the trial court's ruling 'will be upheld so long as reasonable minds can disagree as to the propriety of the decision made.'" *Id.* ; *see also Spencer v. A-1 Crane Servs., Inc.*, 880 S.W.2d 938, 944 (Tenn. Ct. App. 1994). The trial court exceeds its discretion only when it "applies an incorrect legal standard, or reaches a decision which is against logic or reasoning or that causes an injustice to the party complaining," and this court will not substitute its judgment for that of the trial court in such matters. *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001). In addition to the principles of equity, trial courts should consider two other factors when determining whether to award pre-judgment interest. *Mitchell v. Mitchell*, 876 S.W.2d 830, 832 (Tenn. 1994). First, whether the amount of the debt or obligation at issue is certain or reasonably ascertainable by accounting and the amount is disputed on reasonable grounds. *Id.* Second, whether the existence of the obligation itself is disputed on reasonable grounds. *Id.* (citing *Textile Workers Union v. Brookside Mills, Inc.*, 326 S.W.2d 671, 675 (Tenn. 1959)).

Markow asserts that pre-judgment interest is appropriate in this case as provided for in Tenn. Code Ann. § 47-14-123 (2001). He also claims that pre-judgment interest can be awarded on the

basis of equitable considerations, even when a claim is reasonably disputed. *Myint v. Allstate Ins. Co*., 970 S.W.2d 920, 927-928 (Tenn. 1998).

Pollock contends that the trial court did not abuse its discretion in denying pre-judgment interest in this case. According to Pollock, the trial court's decision to deny pre-judgment interest yielded a fair result because the total amount of the judgment was uncertain. Further, Pollock's denial of liability on Markow's claims and its counterclaim were reasonably grounded.

Our review of the record does not reveal a "manifest and palpable abuse of discretion." We agree that the debt at issue was not clearly certain, and Pollock disputed the debt on reasonable grounds. In the instant case, the matters litigated ranged from upgrades to equipment to Pollock's additional cost to complete the installation of the press. Equitable considerations do not tip in favor of awarding pre-judgment interest in this case in light of the issues litigated. Therefore, the trial court did not abuse its discretion in denying pre-judgment interest.

V. CONCLUSION

This court holds, as follows:

(1) Markow is not entitled to a judgment that includes the final payment of $100,000;

(2) The trial properly awarded $35,305.65 to Markow for Mr. Breisinger's charges incurred after April 1, 2001;

(3) Markow is not entitled to an award of $33,000 for the services he provided after July 27, 2001;

(4) Markow is entitled to an award of $65,000 for the upgraded Oxy Dry Sheeter under the principles of unjust enrichment;

(5) The trial court correctly denied Pollock's claim of $47,652.34, for expenses related to the M.R.S. Printing Erectors because these expenses were not a part of the turnkey installation; and

(6) The trial court did not abuse its discretion in denying pre-judgment interest to Markow.

Thus, for the reasons stated herein, the judgment of the trial court is affirmed in its entirety. The award to Markow in the amount of $21,005.89 is supported by the evidence of record.[3] Costs on appeal are taxed to the Appellant, Gerd Markow. This case is remanded to the trial court for

[3] The trial court mistakenly calculated a judgment total of $21,078.89. This court calculated the total judgment, as follows: Markow's judgment of $100,305.65 ($35,305.65 + $65,000.00) is reduced by 79,299.76, the set-off amount awarded to Pollock. Accordingly, Markow is entitled to a judgment of $21,005.89.

enforcement of the court's judgment and for the collection of costs assessed below, all pursuant to applicable law.

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JOHN W. McCLARTY, JUDGE